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Comments:

Dear Responsible Official:

Thank you for the opportunity to provide comments on the Green Horse Project Proposed Action ("Proposed Action" or "Project"). The Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] ("[auto-markup:Tribal-Related]Tribe[auto-markup end]") has been in communication with the Nez Perce-Clearwater National Forests ("oForest") about this Project since 2019.

The Proposed Action includes silvicultural treatments of regeneration harvest (approximately 1,513 acres) and intermediate harvest (approximately 180 acres): with no harvest in riparian areas, including field-verified landslide prone areas; or verified old growth. There would be prescribed burning on approximately 570 acres, road reconditioning on approximately 20 miles, reconstruction on approximately 19 miles of road, and two miles of new temporary road construction.

[comment:3-35(220 Laws, Policies, Courts)]Since time immemorial, the [auto-markup:Tribal-Related]Tribe[auto-markup end] has occupied and used over 13 million acres of land now comprising north-central Idaho, southeast Washington, northeast Oregon, and parts of Montana. [auto-markup:Tribal-Related]Tribe[auto-markup end] members engaged in fishing, hunting, gathering, and pasturing across their vast aboriginal territory, and these activities play a major role in the subsistence, culture, religion, and economy of the [auto-markup:Tribal-Related]Tribe[auto-markup end].

As the Forest is aware, this Project is located entirely within the [auto-markup:Tribal-Related]Tribe's[auto-markup end] aboriginal territory subject to the rights the [auto-markup:Tribal-Related]Tribe[auto-markup end] reserved, and the United States secured, in the Treaty of 1855 (Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957). [comment end][comment:3-36(220 Laws, Policies, Courts)]The Project is also located within the [auto-markup:Tribal-Related]Tribe's[auto-markup end] area of exclusive use and occupancy, as adjudicated by the [auto-markup:Tribal-Related]Indian[auto-markup end] Claims Commission (Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] v. United States, Docket #175, 18 Ind CL. Comm. 1), and encompasses areas of cultural and spiritual significance to the [auto-markup:Tribal-Related]Tribe[auto-markup end]. As a result, the [auto-markup:Tribal-Related]Tribe[auto-markup end] considers the protection of its treaty-reserved rights, and other rights, and interests, to be a paramount obligation of the Forest when implementing this Project. The Forest has a trust responsibility to ensure that its actions, including implementation of this Project, are fully consistent with the 1855 Treaty, executive orders, departmental regulations, and other federal laws implicating the United States' unique relationship with the [auto-markup:Tribal-Related]Tribe[auto-markup end]. [comment end]

Thank you again for the opportunity to provide comments on the Green Horse Project Proposed Action. The [auto-markup:Tribal-Related]Tribe's[auto-markup end] technical comments follow this letter; they reflect the policy views and technical concerns of the [auto-markup:Tribal-Related]Tribe[auto-markup end]. You are welcome to contact Mike Lopez, Senior Staff [auto-markup:Threats]Attorney[auto-markup end], Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] Office of Legal Counsel, at (20S) 843-7355 or mlopez@nezperce.org, with any questions or concerns.

Sincerely,

Shannon F. Wheeler

Chairman

NEZ PERCE [auto-markup:Tribal-Related]TRIBE'S[auto-markup end] SCOPING COMMENTS ON THE
GREEN HORSE PROJECT PROPOSED ACTION

March 20, 2020

I. GENERAL COMMENTS

a. The Nez Perce [auto-markup:Tribal-Related]Tribe's[auto-markup end] Interest in the Green Horse Project

[comment:3-37(220 Laws, Policies, Courts)]Treaty [auto-markup:Tribal-Related]tribes[auto-markup end], such as the Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] ("[auto-markup:Tribal-Related]Tribe[auto-markup end]"), are recognized as managers of their treaty-reserved resources (*U.S. v. Washington*, 384 F. Supp. 312, 339-40, 403 (W.D. Wash. 1974).). As a manager, the [auto-markup:Tribal-Related]Tribe[auto-markup end] devotes substantial time, effort, and resources to the recovery and co-management of Treaty-reserved resources.

As fiduciary, the United States and all its agencies owe a trust duty to federally recognized [auto-markup:Tribal-Related]tribes[auto-markup end] to protect their treaty-reserved resources (*See, United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).). This trust relationship has been described as "one of the primary cornerstones of [auto-markup:Tribal-Related]Indian[auto-markup end] law," (Felix Cohen, Handbook of Federal [auto-markup:Tribal-Related]Indian[auto-markup end] Law 221 (1982).) and has been compared to the relationship existing under the common law of trusts, with the United States as trustee, the [auto-markup:Tribal-Related]tribes[auto-markup end] as beneficiaries, and the property and natural resources managed by the United States as the trust corpus (*See, e.g., Mitchell*, 463 U.S. at 225.).

All executive agencies of the United States are subject to the federal trust responsibility to recognize and uphold treaty-reserved rights. Executive agencies must also protect the habitats and resources on which those rights rest, since the right to take fish and other resources reserved by the [auto-markup:Tribal-Related]Tribe[auto-markup end] presumes the continued existence of the biological conditions necessary to support the Treaty-reserved resources. (*See, Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, *Sunnyside Valley Irr. Dist. v. United States*, 474 U.S. 1032 (1985).).

Forest Service Manual ("FSM") 1563.8b specifically states that the Forest Service "shall administer lands subject to off-reservation treaty rights in a manner that protects [auto-markup:Tribal-Related]Indian[auto-markup end] [auto-markup:Tribal-Related]tribes[auto-markup end]' rights and interests in the resources reserved under treaty." Further, FSM 1563.03 directs the Forest Service, among other responsibilities, to "[i]mplement Forest Service programs and activities consistent with and respecting [auto-markup:Tribal-Related]Indian[auto-markup end] treaty and other reserved rights and fulfilling the Federal Government's legally mandated trust responsibilities with [auto-markup:Tribal-Related]Indian[auto-markup end] [auto-markup:Tribal-Related]Tribes[auto-markup end]."[comment end]

The [auto-markup:Tribal-Related]Tribe[auto-markup end] recognizes the management need to address insect and disease activity, wildfire risk, and forest resilience, but is concerned about undue impacts to watershed conditions, wildlife species and their habitat, and cultural resources during and after implementation of the Green Horse Project Proposed Action ("Proposed Action" or "Project").

II. WILDLIFE COMMENTS

Silviculture Prescriptions

[comment:3-1(142 Timber Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] has concerns that the Proposed Action's proposed silviculture prescriptions may not match with the potential vegetation type groups that are within the Project area. The landscape appears to be predominantly moist uplands and breaklands supporting grand fir, western redcedar, Pacific yew, Douglas-fir, and subalpine fir. What are the existing conditions within each stand that are driving selection of the proposed silvicultural treatments? What ecological problem in these areas is this Project intended to correct? What are the successional pathways, understory conditions, and other factors for developing the prescriptions?
[comment end]

[comment:3-2(142 Timber Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] generally supports revitalization of early-seral, fire-resistant, and disease-/insectresistant tree species where ecologically appropriate, but how appropriate is it to change the species composition to ponderosa pine and Douglas fir—species more adapted to warm and dry landscapes—within the Project area? Are there stands within the Project area that meet old growth forest characteristics? [comment end][comment:3-3 (142 Timber Mgmt)]Have the proposed units and prescriptions been field-verified? And if not, when will field verification of the units occur?[comment end]

[comment:3-4(142 Timber Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] is also concerned about site preparation treatments for reforestation, such as herbicide and rodenticide applications, and their impacts to wildlife and forage resources. Please provide specific details of what pesticides will be used, how often, and how the applications may impact wildlife and plants over the life of the Proposed Action.[comment end]

[comment:3-5(136 Fire and Fuels Mgmt)]The proposed prescribed burning treatments include the torching of individual or groups of trees to create a mosaic of burned and unburned conditions. The [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends that the Forest do not burn trees with obvious nests or cavities, and especially not during the breeding season of migratory birds and mammals.
[comment end]

Large Openings

[comment:3-6(203 Multiple Resources/Reasons)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] is concerned with the number of large openings that would be created in the Project area by regeneration treatments. Large openings have the potential to impact how terrestrial species move across the landscape. The large openings proposed under the Proposed Action could exacerbate resource conditions within the Project area, including impacts from motorized use of the road network, cattle grazing, previous soil disturbance, and establishment and spread of undesirable plant species[comment end]. [comment:3-7(143 Wildlife/Animals Mgmt)]Although regeneration of vegetation following timber harvest may promote forage production for wildlife, the creation of very large openings from harvest are a concern from a vulnerability standpoint, as extended sight lines may allow for extreme-range shooting of big game by hunters from elevated vantage points.[comment end]

[comment:3-8(142 Timber Mgmt)]The Proposed Action states that units may be smaller at layout than what will be analyzed in the environmental assessment. In the Forest's recent experience with similar projects, what is the percentage of layout units that have been smaller than the analyzed units? What is the potential for the layout units to stray beyond the boundaries analyzed in the environmental assessment?[comment end] What is the condition of areas adjacent to units that may be greater than 40 acres?

Mitigation Measures

[comment:3-9(142 Timber Mgmt, 203 Multiple Resources/Reasons)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] requests that the Forest provide data in the Project record to show that the mitigation measures in the Proposed Action have been validated for effectiveness by field surveys and monitoring. The [auto-markup:Tribal-Related]Tribe[auto-markup end] also requests that the Forest monitor the mitigation measures for effectiveness during and after implementation.[comment end]

[comment:3-10(143 Wildlife/Animals Mgmt)]What is the reason behind implementing the mitigation

measures WL 1, WL 2, and WL 3 in units 18, 19, and 21?[comment end] [comment:3-11(143 Wildlife/Animals Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends implementing WL 1 through WL 5 (and adding areas outside Management Area 21) in all units, where appropriate, and adding a mitigation measure to retain trees and snags with nests and cavities.[comment end] [comment:3-12(143 Wildlife/Animals Mgmt)]To maintain wildlife security along roads with roadside treatments, the [auto-markup:Tribal-Related]Tribe[auto-markup end] asks that the Forest take advantage of natural topography and harvest methods (feathering, skips, etc.) when marking units.[comment end] [comment:3-13(134 Soils Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] also recommends adding a mitigation measure to minimize impacts to soils when conducting site preparation and prescribed burning.[comment end]

Impacts to Wildlife and Plant Species

[comment:3-14(203 Multiple Resources/Reasons)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] requests that the Forest adequately assess impacts of the Proposed Action and any alternatives to wildlife and plants, including understory vegetation conditions and old growth stands (outside of Management Area 20), using the best available scientific information. [comment end][comment:3-15(143 Wildlife/Animals Mgmt)]Other than reporting the number of acres treated in each species' habitat, the analysis should provide information on species' occurrence, population information, and direct, indirect, and cumulative impacts to species and their habitats.[comment end] [comment:3-16(143 Wildlife/Animals Mgmt)]The Idaho Fish and Wildlife Information System documents an occurrence of Canada lynx in the Project area in 2001, but the Proposed Action does not include this information. Please evaluate impacts to threatened, endangered, proposed, and candidate species.[comment end]

[comment:3-17(143 Wildlife/Animals Mgmt)]The proposed vegetation management could improve forage for not only big-game, but also for livestock. The [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends that the Forest evaluate potential conflicts between wildlife and livestock for forage resources during and after Project implementation.[comment end]

[comment:3-18(203 Multiple Resources/Reasons)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends that the Forest evaluate potential impacts to wildlife and plants from burn treatments that would be allowed to [auto-markup:Request for Comment Extension]extend[auto-markup end] beyond unit boundaries.[comment end]

III. WATERSHED COMMENTS

[comment:3-19(220 Laws, Policies, Courts)]The Proposed Action references the Clearwater Basin Collaborative Restoration Strategy, Selway-Middle Fork Clearwater Subbasin Assessment, Nez Perce Clearwater National Forest Land Management Plan, and Idaho County Natural Resources Plan. The Forest does not reference the Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] Department of Fisheries Resources Management Plan which emphasizes the protection of important Treaty resources present in the Project area.

The Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] Department of Fisheries Resources Management will protect and restore aquatic resources and habitats. Our mission will be accomplished consistent with the Nimiipúu way of life and beliefs, which have the utmost respect for the Creator, for all species, and for the past, present, and future generations to come. Our mission will be consistent with the reserved rights stated within the Nez Perce [auto-markup:Tribal-Related]Tribe's[auto-markup end] 1855 Treaty (*Nez Perce [auto-markup:Tribal-Related]Tribe[auto-markup end] Department of Fisheries Resources Management Plan 2013-2028*, (2013) at 26, available at <https://damsense.org/wp-content/uploads/2016/05/Nez-Perce-Fish-Management-Plan-2013-2028.pdf> (last visited Mar. 10, 2020)).[comment end]

Temporary Roads

[comment:3-20(142 Timber Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] appreciates the placement of temporary roads on ridgetops and decommissioning them after use. The [auto-markup:Tribal-Related]Tribe[auto-markup end] encourages the Forest to minimize their construction to the greatest extent possible. A full recontour of these roads is recommended consistent with the practices reflected in the partnership between the [auto-markup:Tribal-Related]Tribe[auto-markup end] and the

Forest.[comment end]

Road Improvement and Decommissioning

[comment:3-21(151 Roads Management)]The Project area contains a number of roads with high erosion and failure potential. These problem roads should be improved to a condition to reduce failure risk as well as decrease erosion detrimental to fish and water quality.[comment end] [comment:3-22(151 Roads Management)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends that the Forest use Geomorphic Road Analysis and Inventory Package ("GRAIP") to inventory roads within the sale area (including all haul roads) prior to improvement activities to ensure the highest priority and contributing segments are addressed.[comment end] [comment:3-23(151 Roads Management)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] urges the Forest to consider using road decommissioning as a tool to remove problem roads which are not currently used and are not planned for use in future management activities.[comment end]

Harvest Units

[comment:3-24(132 Water, Watershed Mgmt)]A review of the Proposed Action harvest unit boundaries indicates that PACFISH buffers may not have been applied to all perennial streams within the Project area.[comment end] Additionally, [comment:3-25(132 Water, Watershed Mgmt)]the Forest may benefit from using the updated landslide prone layer for delineating areas to drop to streamline project development.[comment end]

Invasive Species

[comment:3-26(141.03 Invasive Vegetation Treatment)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends additional consideration for invasive species treatment and prevention in the Project area given the presence and proximity to a variety of highly competitive invasive plants. The concern for spreading invasive species is increased due to the presence of an active cattle allotment. Roadside brushing can increase area available for invasive species establishment and should be completed only when necessary and be followed by treatment and or seeding of native grasses and forbs.[comment end]

Harvest of 180 acres within the O'Hara-Falls Creek and West Meadow Creek Roadless Areas

[comment:3-27(220 Laws, Policies, Courts)]Inventoried Roadless Areas ("IRAs") are generally considered the "reservoirs" of undeveloped lands within which future wilderness designations may be considered. Because the proposed harvest in the O'Hara-Falls Creek and West Meadow Creek IRA may render the area ineligible or undesirable or a new wilderness designation and will create visible openings and increase wildlife vulnerability, the [auto-markup:Tribal-Related]Tribe[auto-markup end] recommends dropping the units within the O'Hara-Falls Creek and West Meadow Creek IRA. Furthermore, the [auto-markup:Tribal-Related]Tribe[auto-markup end] would like to see the results of the Idaho Roadless Commission's fall 2019 meeting and any data and research related to harvesting in IRAs.[comment end]

Restoration Opportunities

[comment:3-28(132 Water, Watershed Mgmt)]O'Hara Creek is lacking in large woody debris for channel complexity, hydrology and improved fish habitat. The [auto-markup:Tribal-Related]Tribe[auto-markup end] encourages the Forest to try to identify sources of large wood to use for future large wood placement restoration projects.[comment end]

[comment:3-29(151 Roads Management)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] urges the Forest to consider using road decommissioning as a tool to remove problem roads which are not currently used and are not planned for use in future management activities. This would be a good time to obliterate these unused roads as there is a backlog of unused roads thus eliminating maintenance and erosion potential in this sensitive watershed. Please fully recontour as many unused roads and leave all roadside vegetation where it falls to increase infiltration and reduce sediment delivery from roads.[comment end]

Fisheries

[comment:3-30(132 Water, Watershed Mgmt)]Page 22 of the Proposed Action states that there will be no effect to threatened bull trout and steelhead or designated critical habitat from this federal action. In support of this statement, the Forest makes a general reference to modeling results demonstrating no measurable sediment will adversely impact streams. Please provide more detailed information regarding the data used, date and type of analysis performed, and conclusions made to support the Forest's determination.[comment end]

The Selway River is one of the last genetic strongholds for steelhead. [comment:3-31(132 Water, Watershed Mgmt)]Skyline and especially tractor logging systems are more invasive and less in alignment with the 1997 Biological Assessment and the 1998 Biological Opinion for Land and Resource Management Plans for National Forest and Bureau of Land Management Resource Areas in the Upper Columbia River Basin and Snake River Basin Evolutionary Significant Units. Federal actions in the Selway River drainage should comply with the following mitigative measures: "Only use timber harvest methods (such as helicopters, horses, etc.) that result in low levels of ground disturbance or that avoid adverse effects to steelhead." (National Marine Fisheries Service, Northwest Region, (1998), Biological Opinion for Land and Resource Management Plans for National Forests and Bureau of Land Management Resource Areas in the Upper Columbia River Basin and Snake River Basin Evolutionarily Significant Units.)[comment end]

IV. CULTURAL RESOURCES COMMENTS

[comment:3-32(182.01 Cultural, Hist., Anthro. Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] expects that the Forest will share the results of the Proposed Action archaeological survey with the [auto-markup:Tribal-Related]Tribe's[auto-markup end] technical staff and provide them the opportunity to comment on the results. The [auto-markup:Tribal-Related]Tribe[auto-markup end] also expects that the six previously identified archaeological sites, as well as any sites discovered during the survey yet to be conducted for this Project, will be evaluated under all four National Register Criteria, not just under Criterion D, scientific value[comment end].

[comment:3-33(182.01 Cultural, Hist., Anthro. Mgmt)]The [auto-markup:Tribal-Related]Tribe[auto-markup end] should also be provided the opportunity to conduct an ethnographic study to identify and evaluate any historic sites of religious and cultural significance to the [auto-markup:Tribal-Related]Tribe[auto-markup end] in the Project area. The [auto-markup:Tribal-Related]Tribe[auto-markup end] does not believe that the Forest Programmatic Agreement with the Idaho State Historic Preservation Office is appropriate to address these resources[comment end].

Finally, [comment:3-34(182.01 Cultural, Hist., Anthro. Mgmt)]the [auto-markup:Tribal-Related]Tribe[auto-markup end] should be consulted on the most appropriate way to avoid damage to eligible historic properties. Buffering the site to create an exclusion zone may not adequately protect the values that make the sites significant to the [auto-markup:Tribal-Related]Tribe[auto-markup end].[comment end]